No. 86-1472

In The
Supreme Court of the United States

OCTOBER TERM, 1986

VIVIENNE RABIDUE,
Petitioner,

v.

OSCEOLA REFINING COMPANY, a division of Texas-American Petrochemicals, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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At issue are Section 2000e-2(a) of Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e, *et seq.* and Sections 37.2102(1), (2) and 38.2103(h)(i-iii) of the Michigan Elliott-Larsen Civil Rights Act, M.L.C.A. § 37.2101, *et seq.*, the texts of which appear in the Appendix.

STATEMENT OF THE CASE

Petitioner, Vivienne Rabidue, brought suit against Texas-American Petrochemicals, Inc. ("Texas-American")[1] in the United States District Court for the Eastern District of Michigan challenging the termination of her employment and certain working conditions while employed. Petitioner alleged sex discrimination in the form of both disparate treatment and discriminatory discharge as well as sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, and the Michigan Elliott-Larsen Civil Rights Act, M.C.L.A. § 37.2101, *et seq.* Petitioner also asserted a claim under the Federal Equal Pay Act, 29 U.S.C. § 206(d).

The acts complained of occurred during Petitioner's six years of employment with Osceola Refining Company ("Osceola"). During those years, Osceola was owned and operated by three separate corporations. Because only Texas-American, the last of the three owners, was named as defendant, it asserted as an affirmative defense the argument that it was not liable for alleged unlawful acts which occurred before September 1, 1976, the date on which it acquired the assets of the refinery.

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[1] Osceola Refining Company is a division of Texas-American Petrochemicals, Inc., a Texas corporation. Rule 28.1.

Following a five-day bench trial held in May, 1983, District Court Judge Stewart A. Newblatt found in favor of Texas-American on each claim and on the successorship defense. *Rabidue* v. *Osceola Refining Co.*, 584 F.Supp. 419 (E.D.Mich. 1984); (Petitioner's App. A). The United States Court of Appeals for the Sixth Circuit affirmed in an order entered November 13, 1986. *Rabidue* v. *Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986); (Petitioner's App. B).

Petitioner now challenges: (1) the standard of review applied to Petitioner's claim of sex harassment in the form of a hostile or offensive work environment; and (2) application of federal successor liability doctrine to Petitioner's state civil rights claims.[2]

SUMMARY OF ARGUMENT

The sex harassment proscriptions of Title VII and the Michigan Elliott-Larsen Act are designed to balance an employee's right to be free from workplace harassment against the recognition that not all offensive conduct rises to the level of actionable harassment. *Meritor Savings Bank* v. *Vinson*, 477 U.S. ____; 106 S. Ct. 2399, 2406; 91 L.Ed 49, 60 (1986); *Slayton* v. *Michigan Host, Inc.*, 144 Mich. App. 535, 549, 376 N.W.2d 664 (1985). The standards used in this balancing process are described at length in *Vinson* and are precisely those adopted and applied here by the lower courts. 106 S. Ct. at 2404-2407; *Rabidue* v. *Osceola Refining Co.*, 584 F.Supp. 419, 427-35 (E.D.Mich. 1984), *aff'd* 805 F.2d 611, 620-21 (6th

[2] The Petition does not challenge disposition of any of the remaining claims. Consequently, Petitioner's argumentative reference to disparate treatment at page 17 of her brief is superfluous. Moreover, Petitioner mischaracterizes the Sixth Circuit decision. The majority did *not* find that she was "discriminatorily denied" any employment benefit. Rather, the majority affirmed the trial court's finding of no discriminatory treatment regarding the terms and conditions of her employment. 805 F.2d at 618 (Petitioner's App. B at 9).

Cir. 1986). Indeed, those same standards are applied by lower courts in other circuits without conflict.[3]

The standards require evidence of sexually offensive conduct sufficiently severe so as to: (1) threaten, intimidate, interfere with job performance, or create an offensive or hostile work environment; and (2) seriously affect the plaintiff's psychological well-being. No court has held, here or elsewhere, that objectionable conduct alone, absent job interference in the form of threats, intimidation, abuse, inability to perform or a pervasive offensive work environment, and absent a demonstrable psychological injury, constitutes actionable sex harassment.

Here, Petitioner contends that a co-worker's use of vulgarities and the display of certain posters[4] in the offices of coworkers *per se* constitute a sexually offensive or hostile work environment, despite the specific findings of both courts below that the conduct was not threatening or intimidating and neither interfered with Petitioner's job performance nor adversely affected her psychological well-being. 584 F. Supp. at 423, 432-33. Applying that set of facts to established sex harassment principles, both lower courts found no sexual harassment. Petitioner now attempts in essence to avoid those factual findings by arguing that the standards requiring an adverse effect are unreasonable.

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[3] *Downes* v. *Federal Aviation Administration*, 775 F.2d 288, 292-95 (D.C.Cir. 1985); *Katz* v. *Dole*, 709 F.2d 251, 254 (4th Cir. 1983); *Henson* v. *City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982); *Rogers* v. *EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert denied* 406 U.S. 957 (1972); *Continental Can* v. *State of Minnesota*, 22 FEP Cases 1808 (Minn.Sup.Ct. 1980).

[4] Although the trial court found that "a number of" male employees displayed sexually explicit "posters", the testimony of Petitioner's witnesses established that only *one* poster was on the premises. Testimony of Joyce Solo. 2-107. That poster, a cartoon, *not* a photograph, was on the back of the door inside of a male employee's office. Solo, 2-107, 2-108.

Because the Sixth Circuit applied the standards adopted in *Vinson* and those applied by the lower courts in all other circuits, and because the Sixth Circuit affirmed the district court's factual findings as to no threats, intimidation, job interference or psychological injury, the issues raised in the Petition were properly resolved and do not merit this Court's review.

Likewise, the Sixth Circuit's application of federal successor liability doctrine to Plaintiff's state law claims was also correct. Both the trial court and the appellate court noted that Michigan has no body of law governing successor liability. Moreover, given that: (1) the Elliott-Larsen Act contains no successorship provision; (2) the Michigan Civil Rights Commission Guidelines parallel federal Equal Employment Opportunity Commission Guidelines; and (3) the Michigan judiciary generally adopts Title VII standards in applying the Elliott-Larsen Act, sufficient justification exists for applying Title VII successorship doctrine to Elliott-Larsen claims. *See Rabidue*, 584 F.Supp. at 427, 435 n.58; *Rabidue*, 805 F.2d at 617 n.2.

Because the Sixth Circuit's holdings do not conflict with this Court's *Vinson* decision or with the appellate courts or state courts of last resort, Texas-American respectfully submits that the Petition For Writ of Certiorari must be denied.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY APPLIED THE APPROPRIATE STANDARDS TO PETITIONER'S HOSTILE AND OFFENSIVE WORK ENVIRONMENT CLAIMS AND, THUS, THE COURT'S HOLDING PRESENTS NO QUESTION WORTHY OF REVIEW

A. Language Which Is Not Threatening, Which Does Not Intimidate, Which Does Not Have The Effect Of Interfering With Work Performance Or Of Creating A Hostile Or Offensive Work Environment And Which Has No Adverse Psychological Effect, Is Not Sufficiently Severe Or Pervasive To Constitute Sex Harassment

The Sixth Circuit correctly concluded that Petitioner's proofs failed to establish sex harassment. Applying the standard announced by this Court in *Meritor Savings Bank* v. *Vinson*, the Sixth Circuit stated as follows:

> After having considered the EEOC guidelines and after having canvassed existing legal precedent that has discussed the issue, this court concludes that a plaintiff, to prevail in a Title VII offensive work environment sexual harassment action, must assert and prove that: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work

performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondant superior liability. *See Vinson*, 106 S.Ct. at 2404-06; *Downes*, 775 F.2d at 292-95; *Katz*, 709 F.2d at 254; *Henson*, 682 F.2d at 903-05. *Cf. Erebia* v. *Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1253-59 (6th Cir. 1985)(racial hostile work environment claim); *Torres* v. *County of Oakland*, 758 F.2d 147, 152 (6th Cir. 1985) (national origin hostile work environment claim); 805 F.2d 619-20.

The Sixth Circuit summarized the standard as follows:

> Thus, the plaintiff to have prevailed in her cause of action against the defendant on this record must have proved that she had been subjected to unwelcomed verbal conduct and poster displays of a sexual nature which had *unreasonably interfered with her work performance and created an intimidating, hostile, or offensive working environment that affected seriously her psychological well-being*. 805 F.2d at 622 (emphasis added).

Each element is consistent with the Court's analysis and discussion in the *Vinson* decision, 106 S. Ct. at 2404-07, and with the leading cases cited from other federal circuits.[5]

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[5] Contrary to the argument at pages 19 and 20 of the Petition, the Sixth Circuit applied the very same standards applied in *Henson* v. *City of Dundee*, 682 F.2d 897 (11th Cir. 1982), and *Bundy* v. *Jackson*, 641 F.2d 934 (D.C.Cir. 1981). The Court should note that Petitioner merely asserts a deviation from the prevailing case law without identifying the deviation or describing its significance.

Moreover, despite Petitioner's argument at pages 20 and 21 of the Petition, the Sixth Circuit did adopt the same respondeat superior principles approved of in *Vinson* and issued by the EEOC. Further, given that no sex harassment was found, there was no need for the Sixth Circuit to rule on the issue of respondeat superior liability for harassment by a co-worker.

Critical to the analysis is the lower courts' factual finding that the conduct objected to — crude language and certain posters — did not threaten or intimidate Petitioner, did not interfere with Petitioner's job performance and had no effect upon Petitioner's psychological well-being. 584 F. Supp at 432-33. Those factual findings, affirmed by the Sixth Circuit, are not challenged in the Petition and are not the type of findings worthy of this Court's review.

Nonetheless, a review of the record establishes ample support for those findings. Petitioner's proofs established that her peer, co-worker Douglas Henry, used crude language in general conversation, but did not do so with the purpose or intent of intimidating, offending or interfering with Petitioner's employment. 584 F. Supp. at 423; 805 F.2d at 615. But for once calling Petitioner "a fat ass," he did not direct vulgarities at Petitioner. *Id.* He, instead, was in the habit of using bad language. Petitioner, however, had only occasional contact with Henry and, therefore, was not exposed to his language on a routine basis. *Id.*

The district court, which found Petitioner to have an "abrasive, rude, antagonistic, extremely willful, uncooperative and irascible personality," also found that she was not at all affected psychologically by Henry's language, nor was use of the language so pervasive as to interfere with her performance or create a hostile or offensive working environment. 584 F. Supp at 432-33; 805 F.2d at 615, 622. Indeed, Petitioner was lawfully terminated as a result of "her many job-related problems, including her irascible and opinionated personality and her inability to work harmoniously with co-workers and customers." *Id.* The termination itself occurred after Petitioner initiated a shouting-match between herself and the Company's major customer. *Id.*

Finally, the posters objected to were displayed in private offices and depicted partially clad or nude women.[6] The district court found that they, too, neither interefered with Petitioner's job performance, nor affected her psyche. *Id.*

The Sixth Circuit held:

> In the case at bar, the record effectively disclosed that Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees. The evidence did not demonstrate that this single employee's vulgarity substantially affected the totality of the workplace. The sexually oriented poster displays had a de minimis effect on the plantiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places. In sum, Henry's vulgar language, coupled with the sexually oriented posters, did not result in a working environment that could be considered intimidating, hostile, or offensive under 29 C.F.R. § 1604.11(a)(3) as elaborated upon by this court. *Id.*

Petitioner's claims were properly held to the standard announced in *Rogers* v. *EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert denied*, 406 U.S. 957 (1972), and adopted in *Vinson*, requiring proof of a work environment "so heavily polluted with discrimination" as to impede work performance and "affect seriously" Petitioner's psychological well-being. Petitioner's proofs failed to meet either standard. Indeed, she introduced no evidence indicating that either her work performance or her psychological well-being were in any way adversely affected by the language or the posters.

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[6] As discussed in footnote 4, *infra*, the record establishes that only one poster was displayed, a cartoon rather than a photograph or more graphic depiction.

Both Petitioner and Amicus Curiae grossly distort the nature of the proofs at trial and mischaracterize the Sixth Circuit's ruling. The Sixth Circuit recognized that conduct which is not overtly sexual in nature can form the basis of a sex harassment claim. The court stated that the conduct need only be conduct that would not have occurred but for the plaintiff's sex. 805 F.2d at 620. The court recognized, therefore, that threatening or intimidating conduct, with no sexual overtones, but which is directed only at women, can support a claim. The Sixth Circuit's ruling, therefore, is not in conflict with *McKinney* v. *Dole*, 765 F.2d 1129 (D.C.Cir. 1985), as asserted at page 9 of the Petition of the Amicus Curiae.

Further, the trial court found that the language at issue here was sexual in nature. That finding was not appealed to the Sixth Circuit. Therefore, contrary to the argument of the Amicus Curiae at pages 9–14 of their Petition, this record raises no question as to whether the conduct at issue was "sexual in nature" or as to the ramifications of conduct which is not sexual in nature.

Moreover, Petitioner and Amicus Curiae distort the case law by suggesting that the Sixth Circuit's analysis creates a test different from that applied to race or national origin hostile environment claims. The requirement that the conduct be sufficiently pervasive and severe as to adversely affect either job performance or the quality of the work environment as well as plaintiff's psyche is precisely the standard applied in *Rogers* v. *EEOC*, 454 F.2d 234 (5th Cir. 1971), a case which involved a claim of a racially hostile work environment. *See also Erebia* v. *Chrysler Plastic Products*, 772 F.2d 1250 (6th Cir. 1985).

The *Rogers* analysis was expressly approved of and applied to sexually hostile environment claims in this Court's *Vinson* decision. Accordingly, by applying the *Rogers* analysis, the Sixth Circuit neither departed from the prevailing standard of review nor applied a test different from that applied to other types of hostile or offensive environment claims.

Further, the adverse impact requirement is essential. Without it, any objectionable conduct, regardless of its frequency or magnitude, could result in liability. This result is directly contrary to the *Vinson* and *Rogers* decisions, wherein this Court emphasized that "mere flirtations" and isolated incidents with no adverse effect upon employment are not the type of conduct for which employers are liable under Title VII. 106 S Ct. at 2406.

The essence of Petitioner's appeal lies in her efforts to have this Court reverse the trial court's factual findings and the affirmance of those findings by the Sixth Circuit. Both lower courts agreed that the language and posters did not threaten or intimidate Petitioner, "interfer[e]" with Petitioner's work performance or create a hostile or offensive work environment. They also agreed that the conduct did not have any effect upon Petitioner's psyche. Each finding is a factual finding subject to the clearly erroneous standard of Rule 52 of the Federal Rules of Civil Procedure. *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985); *see e.g. Sones-Morgan* v. *Hertz Corp.*, 725 F.2d 1070 (6th Cir. 1984).

Factual findings of this nature, particularly given the credibility assessments necessarily made by the trial court, do not merit this Court's review. Because both lower courts properly applied the correct legal standards to the facts of record, the Court should decline to issue a Writ of Certiorari.

B. The Lower Court Properly Reviewed The Totality Of The Circumstances From The Perspective Of A Reasonable Person.

The *Vinson* decision expressly directs the lower courts to review the totality of the circumstances when determining whether the objectionable conduct had the effect of creating a hostile or offensive environment:

> The EEOC guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and 'the totality of the circumstances, such as the nature of the sexual advances *and the context in which the alleged incidents occurred.' Vinson*, 106 S. Ct. at 2407, quoting EEOC guideline 1604.11(b). 29 C.F.R. § 1604.11(b). (emphasis added).

Here, the Sixth Circuit reviewed the facts in context and found them insufficient to establish actionable sexual harassment.

This holding correctly results from review of the "totality of the circumstances." Moreover, there is nothing improper about including among those circumstances the recognition that modern society condones language and pictures having some sexual content. Any other treatment of the issue is unworkable and ignores reality, particularly the reality of employment in a northern Michigan oil refinery.

The Sixth Circuit did not, as stated by the Amicus Curiae, "equate sexual displays on television with misogynous language in the workplace." The Court's comments regarding erotica in society pertained only to whether the posters at issue, distinct from the language, were sufficiently offensive to constitute harassment. 805 F.2d at 622, *infra* at 9. The Court concluded that the posters had only a *de minimis* effect when viewed in the context of the erotica in our society. *Id.* The alleged "misogynous language" was reviewed separately to determine whether it was sufficiently severe and pervasive and had an adverse psychological effect upon Petitioner. *Id.* The Court concluded that the nature and limited frequency of the language did not establish an offensive or hostile environment or in any way affect Petitioner's psychological well-being. *Id.* Indeed, she continued to exhibit the same "rude, willful, irrascible personality" in all facets of her work performance, regardless of any comments by Doug Henry.

The Sixth Circuit made no sweeping sociological comment upon societal tendencies regarding the use of vulgarities. Nor did the court condone such language or indicate that severe and pervasive sexual vulgarities in the workplace would be condoned.

The court specifically ruled that when a work environment becomes "heavily polluted" with discrimination, it must be remedied — precisely the standard from *Rogers* which this Court approved in *Vinson*. Moreover, at no point has Texas-American argued that lewd and vulgar language can never constitute sex harassment. Texas-American argues only that no sex harassment existed under the specific set of facts at issue here, where the trial court found no intent to offend, manipulate, intimidate, or drive a female employee out of the workplace, where no intimidation, interference, or adverse effect upon Petitioner was shown, and where Petitioner was occasionally exposed to lewd language, little of which, if any, was personally directed at her.[7]

Moreover, contrary to Petitioner's characterizations, the lower courts did not limit their review to a determination of whether the conduct, as a matter of law, would have interfered with or caused psychological injury to a reasonable person. The district court specifically found that the facts of record did not establish interference with this particular Petitioner's job performance and did not establish that this Petitioner suffered

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[7] The record in this action does not contain facts nearly as compelling as those in cases in which sex harassment is found. *Bundy* v. *Jackson*, 641 F.2d 934 (D.C.Cir. 1981) (continued sexual propositions from supervisors and co-workers); *Hensen* v. *City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (harangues and demeaning inquiries regarding plaintiff's sexual proclivities and repeated requests for sexual relations from her supervisor); *Katz* v. *Dole*, 709 F.2d 251 (4th Cir. 1983) (repeated sexual propositions, slurs, insults and innuendo by supervisors and co-workers); *See Rabidue*, 805 F.2d at 622 n.7.

any psychological injury. 584 F. Supp. at 423, 432–33. Neither factual finding was challenged on appeal to the Sixth Circuit.

Given these facts, the Sixth Circuit, having adopted the accepted standard requiring job interference and psychological injury, affirmed the lower court's finding of no sex harassment. In doing so, the Sixth Circuit stated that, not only must actual interference and injury to the plaintiff be proved, but also that "the conduct would have interfered with a reasonable individual's work performance and would have affected seriously the psychological well-being of a reasonable employee" under similar circumstances. 805 F.2d at 620.

Partial reliance upon an objective standard in this manner is essential. Complete reliance upon a plaintiff's subjective expectancies and sensibilities alone provides no standard whatsoever. Without a standard concerning objectionable conduct, employers cannot reasonably foresee the consequences of maintaining a given work environment. Likewise, a strict subjective standard provides no protection to coworkers in the exercise of their right to free speech. Just as in the case of obscenity or with the tort of intentional infliction of emotional distress, reliance upon the plaintiff's subjective perspective alone permits potential liability each time an employer allows talk on a shop floor.

Because the Sixth Circuit applied the very standards adopted in *Vinson* and uniformly applied among the lower courts, the Petition raises no questions worthy of this Court's review.

II.

THE APPLICATION OF FEDERAL SUCCESSOR LIABILITY DOCTRINE TO PETITIONER'S STATE SEX HARASSMENT CLAIM DOES NOT CONFLICT WITH STATE LAW AND DOES NOT PRESENT A QUESTION WORTHY OF REVIEW.

Both the district court and the Sixth Circuit properly applied federal successor liability doctrine to Petitioner's state law claim. *Rabidue*, 584 F. Supp. at 427, 435 n.58; 805 F.2d at 617 n.2.

Application of federal successor liability doctrine is appropriate here. Michigan has no body of law governing successor liability for civil rights claims. The lower courts, therefore, correctly applied federal law based upon the following rationale: (1) no state substantive law exists; (2) the Elliott-Larsen Act contains no successorship provision; (3) the Michigan Civil Rights Commission guidelines parallel federal EEOC guidelines; and (4) the Michigan judiciary historically applies Title VII standards to Elliott-Larsen Act claims. *See Rabidue*, 584 F.Supp. at 427, 435 n.58; 805 F.2d at 617 n.2.

Moreover, no Michigan Supreme Court decisions have since been rendered contrary to the Sixth Circuit's ruling. Petitioner's reliance on *Sumner* v. *Goodyear Co, Knight* v. *Blue Cross, Robson* v. *General Motors*, 427 Mich. 505, 398 N.W.2d 368 (1986), is misplaced. That decision merely reviews the continuing violation theory for avoiding application of the state three-year civil rights statute of limitations. The decision does not address and has no bearing upon successor liability. None of the employers in any of the consolidated cases was a successor employer.

If the decision has any relevance, its relevance lies in the fact that the Michigan Supreme Court once again looked to and applied federal law to claims arising under the Michigan Elliott-Larsen Civil Rights Act. 427 Mich. at 525 ("It is therefore appropriate that we, as we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision.")

The Sixth Circuit's rationale and result are proper, do not conflict with state law and, therefore, are not worthy of this Court's review.

CONCLUSION

Because this Petition involves neither issues in conflict with state law nor principles in conflict among the lower courts, the Court should decline to issue a Writ of Certiorari.

Respectfully submitted,
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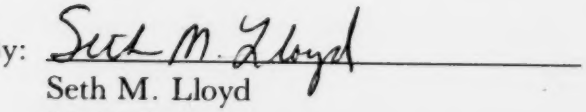
By: 

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APPENDIX

42 U.S.C. § 2000e-2(a)

§ 2000e-2 Unlawful employment practices

(a) Employer practices.

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

37 M.C.L.A. § 37.2102

§ 37.2102. Civil rights; actions based on sexual harassment.

(1) The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, or marital status as prohibited by this act, is recognized and declared to be a civil right.

(2) This section shall not be construed to prevent an individual from bringing or continuing an action arising out of sex discrimination before July 18, 1980 which action is based on conduct similar to or identical to harassment.

37 M.C.L.A. § 37.2103(h)(i-iii)

§ 37.2103. Definitions

As used in this act:

(a) * * *
(b) * * *
(c) * * *
(d) * * *
(e) * * *
(f) * * *
(g) * * *

(h) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:

(i) Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.

(ii) Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment, public accommodations or public services, education, or housing.

(iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.